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states that "even the SEC, whose accomplishment in clarifying law through rule-making is outstanding among the agencies, unduly restrains from resort to rule making." If the SEC continues to adopt the proposals made in the Wheat Report, Professor Davis should henceforth limit his criticism to agencies other than the SEC.

L. THOMAS ELLISTON

FEDERAL COURTS—PROPOSED AIRCRAFT CRASH LITIGATION LEGISLATION

I. INTRODUCTION

The phenomenal growth in the aviation industry is common knowledge today. A recent commentary declared that some 2,600 commercial craft and 120,000 private planes now crowd the nation's skies.¹ An alarming consequence of this growth in air traffic is an increase in the number of airplane crashes. In addition, more people are involved in the typical crash. In July, 1967, a Piedmont Airlines Boeing 727 and a private aircraft collided near Hendersonville, North Carolina, killing 82 persons; and in September, 1969, an Alleghenny Airlines flight collided with a private plane at Indianapolis, Indiana, killing 83. The 1968 passenger death toll on U.S. airlines was 303, the result of ten accidents which also took the lives of 34 crew members. This total made 1968 the second worst fatality year in airline history, surpassed only by the year 1960, in which total passenger deaths reached 334.²

The legal consequences of an air crash are infinitely more complex than other transportation disasters, and the litigation almost always presents special problems. A single crash often gives rise to multiple claims filed in diverse federal districts, each of which has proper jurisdiction and venue. For example, as of January 14, 1969, some 64 separate cases involving wrongful death or personal injury were pending in federal districts in New York, Missouri, and North Carolina, each a result of the Hendersonville disaster.³ It is obvious that sixty-four separate trials, each involving the basic questions of the liability of several possible defendants,⁴ would produce costly duplication of discovery proceedings, attorneys' fees, and the other litigation costs, not to mention the pressure on judicial dockets. Since liability may vary in accordance with the particular state law under which the case is tried, such duplication is arguably a necessary price for a federal

1. TIME, September 19, 1969, at 64.

2. The Washington Post, January 5, 1969, cited in *Hearings on S. 961 Before the Subcomm. on Improvements in Judicial Machinery*, 91st Cong., 1st Sess., pt. w, at 264 (1959).

3. *In re Mid-Air Collision Near Hendersonville, N.C.*, 297 F. Supp. 1039 (J.P.M.L. 1969).

4. Defendants in these cases often include all airline companies involved, manufacturers of the aircraft, the United States under the Federal Tort Claims Act, and the individual pilots and crew members or their estates.

system of law. State law, which ordinarily controls the resolution of substantive issues, may vary as to the use of certain defenses, the burden of proof, the availability of certain theories of recovery such as strict liability, and the use of certain doctrines which ease the plaintiff's burden of proof or which help to overcome certain affirmative defenses (e.g., *res ipsa loquitur*, last clear chance). Additionally, there is the danger of a wide disparity in the amounts recovered by different plaintiffs, since nine jurisdictions, including Missouri, limit the amount recoverable in a wrongful death action.⁵

For these reasons, a need exists for more efficient judicial handling of the legal questions which arise from aircraft disasters. At the present time, federal law provides two statutory remedies, the purposes of which are to alleviate the problems inherent in multiple litigation of identical factual questions.

II. EXISTING FEDERAL LEGISLATION

A. *Change of Venue*

The most widely utilized procedure is section 1404 (a) in title 28 of the *United States Code* which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."⁶ This section, in essence a codification of the doctrine of *forum non conveniens*,⁷ permits consolidation of actions for trial and has definite applicability in multi-district aircraft crash litigation. It allows a court to consider in which available district⁸ the litigation would be the most convenient to all parties and witnesses, and accordingly transfer the case to that district. However, before there can be any transfer under section 1404 (a), federal jurisdiction must first exist. Such jurisdiction is usually based on diversity of citizenship. However, when no diversity exists, and an action is filed in a state court, the remedy provided by section 1404 (a) is totally unavailable.

5. Nine jurisdictions have such legislation at the present time. They are Missouri, § 537.090, RSMo 1967 Supp. (\$50,000); Massachusetts, MASS. GEN. LAWS, ch. 229, § 2 (1967 Supp.) (\$50,000); Kansas, KAN. STAT. ANN. § 60-1903 (1967 Supp.) (\$35,000); Wisconsin, WIS. STAT. § 895.04 (\$23,500); Minnesota, MINN. STAT. § 573.02 (1967 Supp.) (\$35,000); Virginia, VA. CODE ANN. § 8-636 (1968 Supp.) (\$25,000, recently reduced from \$50,000); West Virginia, W. VA. CODE ANN. § 55-7-6 (1967) (\$10,000 to estate, \$100,000 to dependent distributees); Illinois, ILL. REV. STAT., ch. 70, § 2 (1967) (\$30,000); Colorado, COLO. REV. STAT. ANN. § 41-1-3 (1963) (\$25,000).

6. 28 U.S.C. § 1404 (a) (1964). See Annot., 1 A.L.R. FED. 15 (1969).

7. The doctrine of *forum non conveniens* is bottomed upon the right of the Court in the exercise of its equitable powers to refuse the imposition upon its jurisdiction of the trial of cases, even though the venue is properly laid, if it appears that, for the convenience of the litigants and the witnesses, in the interest of justice, the action should be instituted in another forum where the action might have been brought.

Hayes v. Chicago, R.I. & P. R.R., 79 F. Supp. 821, 824 (D.C. Minn. 1948).

8. See *Hoffman v. Blaski*, 363 U.S. 335 (1960); C. WRIGHT, FEDERAL COURTS § 44 (1963).

Whether this section, although admittedly applicable to the air crash case, is adequate to insure the efficient operation of the judicial system is subject to question. Obviously, if actions arising from the same occurrence are filed in several districts, there is the possibility, however remote, that two or more courts will differ on the choice of the most convenient forum. This would only serve to add confusion to the problem sought to be remedied. Moreover, should such an anomalous result occur, the only available remedy would be an extraordinary writ, since the order of transfer as such is not an order from which an appeal can be taken.⁹ Furthermore, as pointed out by Judge William H. Becker, District Judge for the Western District of Missouri, in testimony before the Senate Judiciary Committee, a transfer under section 1404 (a) is a transfer for *all* purposes, the section having no provision to allow recall and adjudication of issues which might not be common to the other cases involved.¹⁰ The transfer would consolidate cases *because* of common questions of fact, but simultaneously trying other issues would waste the time and money of parties not concerned with these divergent issues and place an undue burden on the court and jury.

The possibility also exists that the most convenient forum for all parties and witnesses may not be one to which transfer could be had under section 1404 (a). The Supreme Court, in *Hoffman v. Blaski*,¹¹ has held that transfer to a district where the action *might have been brought* is limited to districts where the plaintiff had an absolute right to institute suit at the time the action was filed. Since present venue requirements are quite narrow—especially in diversity actions where venue exists only in those judicial districts where all plaintiffs or all defendants reside, or where the claim arose¹²—it is easy to conceive of a situation where the only district to which all cases could be transferred would be the situs of the accident. This, in many cases, would not be the most convenient district in which to try the case.

Serious choice of law problems are inherent in a 1404 (a) transfer and the result can be inconsistent treatment of plaintiffs, particularly in wrongful death cases. For many years it was uncertain whether, upon transfer under section 1404 (a), the transferee court must apply the law of the forum state per *Erie R.R. v. Tompkins*,¹³ or the law of the state in which the transferor court was situate. The federal courts have split on this point,¹⁴

9. C. WRIGHT, *supra* note 8.

10. *Hearings on S. 961 Before the Subcommittee on Improvements in Judicial Machinery*, 91st Cong., 1st Sess., pt. w, 233 (1969) [hereinafter cited as *Hearings*]. The statement of Judge Becker, who was appearing ostensibly not to promote any legislation but rather to testify as to the availability and usefulness of present judicial machinery, mentions several of the objections to § 1404 (a) outlined in the body of this article.

11. 363 U.S. 335 (1960). In this case defendant, seeking transfer to a district where plaintiff could not have sued, agreed to submit to service of process, contending that venue objections, like objections to the lack of jurisdiction over the person, could be waived.

12. 28 U.S.C. § 1891 (1964). See note 24, *infra*.

13. 304 U.S. 64 (1938).

14. See the discussion in C. WRIGHT, *supra* note 8, § 44.

some circuits holding that the law of the transferor forum applies, with others applying the law of the transferee forum.¹⁵ The question was partially resolved in the 1964 Supreme Court decision of *Van Dusen v. Barrack*,¹⁶ which directed the transferee court to apply the law of the state of the transferor court. This decision, while stating the applicable rule of law, did not provide relief from the inequity proclaimed to exist in a 1404 (a) transfer. The reason for this was that regardless of which state's laws are applied, it is entirely conceivable that one trial, arising from air crash claims and the product of 1404 (a) transfers, would be tried under several sets of laws, those of each of the various transferor jurisdictions. Differences in tests for liability, availability of defenses, and differing limits on wrongful death recovery would be virtually certain in any large scale transfers. Myriad instructions, involving the application of different laws for different plaintiffs, are bound to produce nothing but headaches in the jury room.¹⁷

B. Judicial Panel on Multidistrict Litigation

The second federal statutory remedy, which became law in 1968 and is found in section 1407 in title 28 of the *United States Code*, created a "Judicial Panel on Multidistrict Litigation" composed of seven federal district and court of appeals judges. This panel was given the power to transfer cases involving the same question of fact to a single district for consolidated pre-trial proceedings.¹⁸ A transfer can be initiated either by the motion of a party to an action or by the panel on its own motion.¹⁹ Such transfer was designed to deal specifically with any multi-district litigation of numerous claims involving the same factual issues. The bulk of the Panel's business thus far has been antitrust and airline crash cases.²⁰

The usefulness of such a procedure in airplane crash litigation is

15. *Headrick v. Atchison, T. & S.F. Ry.*, 182 F.2d 305 (10th Cir. 1950), and *H. L. Green Co., Inc. v. MacMahon*, 312 F.2d 650 (2d Cir. 1962), held that the law of the transferor state should be applied. However, *Reynolds v. Baltimore & O. R.R.*, 185 F.2d 27 (7th Cir. 1950), *cert. denied*, 340 U.S. 947 (1951), held that the law of the transferee state should apply.

16. 376 U.S. 612 (1964).

17. A foreseeable, related problem is that a \$50,000 death limitation may, consciously or unconsciously, cause a jury to hold down the amount given other plaintiffs not subject to such a limitation.

18. 28 U.S.C. § 1407 (a), provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated

19. 28 U.S.C. § 1407 (c) (1964). It should also be noted that § 1407 provides that the only appeal or review of an order of transfer by the Panel is by way of an extraordinary writ under 28 U.S.C. § 1651.

20. *Report of the Judicial Panel on Multidistrict Litigation, Hearings* at 266.

obvious. There is no limitation regarding the district to which the case may be transferred since there is no requirement that the transferee district be one where the action *might have been brought*. Furthermore, with one judicial entity, the Panel, making the decision to transfer, the problem of coordination between courts as to which district the case should be transferred is avoided.

However, the limitation of section 1407 is equally obvious. The transfer is for *pre-trial proceedings only*. Granted, while this goes a long way toward alleviating the waste of time, money, and energy, it does nothing to ease the burden of separately trying each case. Therefore, all consolidation for trial must still proceed under section 1404 (a) and will be subject to the problems presented by a 1404 (a) transfer.

Still another possible solution, which has been used in some instances, is the "test case" approach, whereby all plaintiffs and defendants contract to be bound by the result reached in litigation between one plaintiff and all defendants. Rather than being an answer to the problem, however, it simply underscores the need for change, since the litigants themselves are seeking more satisfactory methods for trying their cases. In addition, this method is limited in that it serves only to determine liability, with damages, if not settled, the subject of further independent lawsuits.

III. THE PROPOSED LEGISLATION

Senate Bill 961,²¹ introduced in the Ninety-First Congress by Senator Joseph D. Tydings of Maryland, and entitled, "A Bill to Improve the Judicial Machinery by Providing for Federal Jurisdiction and a Body of Uniform Federal Law for Cases Arising out of Aviation and Space Activities," proposes to confer exclusive, original jurisdiction upon federal district courts to hear all claims for damages and wrongful death arising from any airline crash covered by the legislation. Federal jurisdiction would lie when the crash involved, (1) a common air carrier, (2) an aircraft which seated more than ten persons, (3) the death or injury of at least five persons, or (4) any outer space activity.²² Any actions brought under this proposed statute would have to be brought within one year after the cause of action accrues.²³

The venue provisions are more liberal than the existing ones found under the general venue section of the *United States Code*.²⁴ The proposed

21. S. 961, 91st Cong., 1st Sess. (1969). [Hereinafter cited as S. 961, § —.] At the present time, S. 961 is still in Senate Committee. No action upon the bill is expected during this term of congress. Letter from Senator Thomas Eagleton to the *Missouri Law Review*, Feb. 19, 1970. The Appendix to this comment contains the salient portions of S. 961.

22. S. 961, § 1363. The constitutional basis for the enactment of S. 961 is the commerce clause. U.S. CONST. art. I, § 8.

23. S. 961, § 2753.

24. 28 U.S.C. § 1891 (1968 Supp.), amending 28 U.S.C. § 1891 (1964), provides that a diversity action may be brought "only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose." A non-diversity suit must be brought in the district where all defendants reside, or where the claim arose. A corporation may be sued in any district where it is incorporated, is doing business, or is licensed to do business. An alien may be sued in any district.

Bill allows suit in any district where plaintiff resides or does business, or where defendant resides, is incorporated, does business, or can be found.²⁵ Any action against the United States can be filed in any district.²⁶ The Bill also provides that service of process, including subpoenas, may be had throughout the United States.²⁷ Having given the federal courts exclusive jurisdiction and having made several forums available to prospective plaintiffs, the Bill further provides that, should an occurrence covered by the Bill engender suits in more than one district, the Judicial Panel on Multi-district Litigation noted above shall have power to transfer the case to *any* district which it considers the most convenient, not merely for pre-trial proceedings but for *all* purposes.²⁸

The Bill would add a new chapter to title 28 of the United States Code. Its provisions, which would cover "all civil legal relations" in an action under the jurisdiction described above, would be exclusive of all other law except to the extent that local law is adopted by the trial court.²⁹ The term "local law," which appears elsewhere as used in the Bill refers to local domestic relations law, inheritance laws, etc.³⁰ Such a provision is an obvious and effective way to end the conflict of law problems.

A right of action is conferred for damage to property, for personal injury, and for wrongful death when these are the result of an air disaster.³¹ The test for liability is left to formulation by the courts.³² The Bill provides for the defense of contributory negligence as applied "in the majority of the States of the United States."³³ Contribution between joint tortfeasors is required, in a percentage determined by the jury in relation to each defendant's degree of liability.³⁴

As to the provisions for wrongful death, the Bill declares its underlying policy to be that any action for wrongful death can only be brought for the benefit of the surviving spouse, children, parents, and dependent

25. S. 961, § 1408 (a).

26. *Id.*

27. S. 961, § 1408 (b). FED. R. Civ. P. 4 (f) provides for service of process within the boundaries of the state where the district court is held unless this territorial limitation is expanded by other federal statutes. FED. R. Civ. P. 45 (e) provides for service of a subpoena within 100 miles of the place of trial.

28. S. 961, § 1408 (c).

29. *Id.* § 2751 (a). To the extent that the statute authorizes the courts to formulate federal law or allows adoption of local, state law by the federal courts, it calls for the creation of "federal common law" in a manner somewhat analogous to that required by the United States Supreme Court in interpretation and enforcement of collective bargaining agreements. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957), the Supreme Court said:

the substantive law to apply in suits under § 301 (a) [dealing with collective bargaining contracts] is federal law, which the courts must fashion from the policy of our national laws. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy.

30. S. 961, § 2751 (a).

31. *Id.* § 2752 (a).

32. *Id.* § 2751 (a).

33. *Id.* § 2752 (a) (1).

34. *Id.* § 2752 (a) (2).

relatives of the deceased.³⁵ The deceased's estate, by exclusion, is not a beneficiary, although his personal representative is permitted to sue for wrongful death.³⁶ In determining the priority of interests of the beneficiaries, the law of decedent's domicile will be applied.³⁷

The Bill also provides for the recovery of pecuniary loss (as opposed to compensation for grief and mental suffering of survivors) in a wrongful death action,³⁸ but expressly states that there shall be no limitation on damages.³⁹ Claims for personal injury of a decedent will survive⁴⁰ but will be combined with the wrongful death action.⁴¹ No damages will be granted for pain and suffering or for disfigurement of a decedent.⁴²

IV. EVALUATION

A. *Statute of Limitations*

The primary complaint voiced by opponents of the Bill⁴³ is that its one year statute of limitations is too short. However, there does appear to be some justification for the period. The reasoning which underlies this provision is probably that, under such a limitation period, all lawsuits could be transferred and consolidated within one year, thereby clearing the matter from the Panel's docket in a relatively short time and getting coordinated discovery and other pre-trial proceedings underway quickly.

Such a policy of limitation is laudable, but it should be balanced against the other interests involved. Investigation of accidents by prospective litigants and agencies of the federal government could conceivably drag on past the one-year benchmark. Claims against the United States, such as those based on negligence of air traffic controllers who are employees of the Federal Aviation Agency, would be under the Federal Tort Claims Act.⁴⁴ Under the Tort Claims Act, a claim must first be presented to the head of the federal agency affected, who then has six months in which to approve or deny the claim, which denial is a prerequisite to filing suit. As pointed out by the American Bar Association Section of Insurance, Negligence, and Compensation, Law,⁴⁵ such claims would have to be filed with the agency within six months, or the claimant's further procrastination could bar him from any legal remedy. In short, a one year limitations period is reduced to six months when the remedy sought is under the Federal Tort Claims Act.

35. *Id.* § 2752 (b).

36. *Id.* § 2762.

37. *Id.* § 2752 (c).

38. *Id.* § 2752 (d).

39. *Id.*

40. S. 961, § 2752 (b) (2).

41. *Id.* § 2762 (d).

42. *Id.* § 2752 (d).

43. The primary opponent appearing at the hearings was Mr. Lee S. Kriendler, a New York attorney who specializes in airplane crash litigation. His prepared statement set forth some of the criticisms discussed in this article.

44. 28 U.S.C. § 2674 (1964).

45. *Hearings* at 254.

Furthermore, this Bill, although ostensibly seeking to provide a broad remedy, actually narrows the rights of almost all plaintiffs by the use of the one year statute of limitations. For example, under the *Erie* doctrine,⁴⁶ a federal court would normally apply state law in a wrongful death diversity case; and most states have limitations of at least two years on wrongful death action.⁴⁷ (Similarly, general statutes of limitations for personal injury actions are usually much longer, usually up to five years.) Therefore, the proposal in effect would shorten the period of time in which plaintiffs must file suit.

The hardships caused by such a limitation clearly seem to outweigh the policy considerations behind it. In light of the foregoing, the American Bar Association has recommended that the limitation period be extended to two years.⁴⁸ Such a period seems much more reasonable.

B. Contributory Negligence

The contributory negligence section of the Bill provides as follows: "the contributory negligence doctrine of the law of the majority of states of the United States is applicable to any such action."⁴⁹ Presumably, the law in a majority of states is that contributory negligence is a bar to recovery.⁵⁰ If this is the rule the statute professes to promulgate, it should be explicitly stated since stating it in the foregoing manner leads not only to speculation and confusion but makes the drafting of instructions impossible. In addition, it can be argued that should the comparative negligence approach (*i.e.*, the application of the general theory that a plaintiff's negligence will not bar recovery, but that the jury will reduce his damages proportionately to the amount of negligence attributable to him) become the majority approach, the proposed statute would automatically accommodate it and adjust the federal law accordingly. However, the amendment process in federal legislation is not so difficult that statutory clarity must be sacrificed today to accommodate a change tomorrow.

A viable alternative to the Bill's contributory negligence section might be to substitute a comparative negligence doctrine in its place. If a jury is competent enough to apportion damages among various defendants in proportion to their degree of negligence (and this is questionable),⁵¹ then

46. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

47. See, *e.g.*, § 537.100, RSMo 1967 Supp.; MASS. GEN. LAWS, ch. 229, § 1 (1958); IND. ANN. STAT. § 2-404 (1966 Supp.); KAN. STAT. ANN. § 60-513 (1963); ME. REV. STAT. ANN. tit. 35, § 1514 (1964); WIS. STAT. § 230.21 (1966); MD. ANN. CODE, art. 67, § 4 (1957). But see KY. REV. STAT. § 413.140 (1963), which sets forth a one-year period of limitations.

48. *Hearings* at 254.

49. S. 961, § 2752 (a) (1).

50. States which currently have comparative negligence legislation are Arkansas, ARK. STAT. ANN. § 27-1730.1 (1947); Nebraska, NEB. REV. STAT. § 25-1151 (1943); Wisconsin, WIS. STAT. § 331.045 (1963); Georgia, GA. CODE ANN. § 105-603 (1933); Mississippi, MISS. CODE ANN. § 1454 (1942); and South Dakota, S.D.C.L. § 20-9-2 (1967).

51. Whether a jury is competent to determine what proportion of the overall negligence was attributable to whom has long been the point of attack for opponents of comparative negligence treatment of the defense of contributory negligence. See generally, Klinginsmith, *Torts—Comparative Negligence—Good or Ill for Missouri*, 30 Mo. L. REV. 137 (1965).

it is likewise competent to determine a plaintiff's comparative contributory negligence, if any, and adjust his recovery accordingly. There is no question but that comparative negligence is a proper approach for federal law to take, since it is now part of the Federal Employer's Liability Act.⁵² As in FELA, the proposed Bill creates a remedy for persons injured or killed by the operation of a transportation media, and it could be argued that because of this similarity federal law on contributory negligence should be consistent. If this is so, decisions in FELA cases concerned with the application of comparative negligence theories would be very persuasive authority on similar questions arising under this Bill, and would provide the rules of law now sorely lacking within it.⁵³

C. Scope of Liability

Perhaps the weakest part of Senate Bill 961 is that it leaves to the courts the formulation of the rules of liability under which the case will be tried.⁵⁴ As a result, instead of establishing a "uniform body of federal law," it merely gives the judiciary a free hand to make this law. The Bill never mentions the concept of negligence and never describes any act or omission which would give rise to liability. The writer presumes that a plaintiff would allege negligence (simply because contributory negligence is a defense), but whether he could plead and submit on strict liability, *res ipsa loquitur*, or some other theory is left to judicial decision. The end result of this weakness in the Bill is that the rules of law under which such actions are to proceed are non-existent. Such uncertainty could hamper settlement negotiations and lead to extended litigation. For this reason the drafters of the Bill should reconsider and supply at least some general guidelines regarding the criteria for liability, leaving only the fine points to judicial formulation.

The Bill provides that its provisions cover "all civil-legal relations"⁵⁵ arising from an incident covered by the Bill's jurisdiction. This clause invites litigation and controversy because it is manifestly overbroad, apparently covering many legal relationships which the statute was not designed to cover. For example, a medical malpractice claim arising from treatment of injuries received in such a plane accident could qualify as a requisite "legal relation." However, it certainly should not be within the ambit

52. 45 U.S.C. § 53 (1964), states:

the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to each employee. . . .

53. An unanswered and interesting question which is necessarily adjunct to the contributory negligence problem is whether the doctrines of "last clear chance" and the so-called "humanitarian negligence"—both of which mitigate a contributory negligence defense—are included with the defense applied in the "majority of the States of the United States." The argument could be made, probably with some success, that such doctrines are indeed a part of the contributory negligence law of a particular jurisdiction, and would thereby be applicable under such a statute.

54. S. 961, § 2751 (a).

55. *Id.*

of the Bill. Rather, the provision should be changed to expressly limit the statute's application to actions against those whose culpability was causal to the crash; to actions for personal injury, property damage, death claims; and to actions involving ancillary but directly related issues. Otherwise, the provision as presently drafted will only impede a supposedly streamlined litigation process and thereby ultimately frustrate the primary purpose of the Bill, *i.e.*, speedy legal relief for a large number of claimants with similar claims.

D. Choice of Law

In opposition to the Bill, it has also been argued that the present choice of law problems are not so critical as to warrant legislation of this type. In his statement presented at the subcommittee hearing on Senate Bill 961, Mr. Lee S. Kriendler, New York attorney, stated:

One of the Bill's manifest purposes is to eliminate choice of law problems in aviation disasters. These problems, however, are largely in terms of the existence of wrongful death limitations. The number of states with such limitations has been drastically reduced, and undoubtedly within the next few years these limitations will disappear. Furthermore, there has been a revolution in choice of law principles which has permitted courts of other states much greater flexibility in applying reasonable law to these situations.⁵⁶

Kriendler seems to take the position that if the problem is ignored it will go away. It is true that at present only nine states have wrongful death limitations,⁵⁷ but among those nine are several states with centers of high population concentrations and a high level of air traffic. The risk of inequitable treatment of plaintiffs thus remains great because of the limitations in those nine key states, and reliance upon state legislatures to change the statutes limiting recovery may be in vain. State legislatures are not well known for their amenability to change or their responsiveness to the needs of the judicial system. In addition, insurance companies, seeking to maintain maximum recovery limits wherever possible, lobby with some success in the various statehouses, while there is seldom any organized effort to procure changes in these statutes, unless initiated by the local bar associations.

E. Compensation for Injury

In his statement Kriendler also criticized the Bill on the ground that the compensation for wrongful death, though unlimited in amount, was restricted to pecuniary loss only, and such a restriction would keep recoveries (and, necessarily, attorneys' fees) below a figure which may be reached if a jury were to consider the mental suffering and loss of affections of the decedent's survivors.⁵⁸ However, this merely begs the question, especially

56. *Hearings* at 257.

57. *See* note 4, *supra*.

58. *Hearings* at 256.

in light of his opinion that the Bill was unnecessary from a choice of law standpoint, since most states have such provisions limiting recovery to pecuniary loss.⁵⁹ As Prosser points out,

pecuniary loss may extend beyond mere contributions of food, shelter, and property or money; and now there is a decided tendency to find that the society, care, and attention of the deceased are "services" with a financial value which may be compensated.⁶⁰

Thus, the fears expressed by Kriendler in this regard are probably ill-founded.

IV. CONCLUSION

Senate Bill 961, like any legislative solution to a legal problem, will not satisfy everyone. Nevertheless, it is a step in the right direction. The need for legislation of this type is apparent in view of the inadequacy of existing federal law.

Such an act would not significantly usurp any power of state courts since most actions covered by the Bill would be filed in federal courts anyway. Rather, the establishment of a uniform body of law to cover air crash litigation can serve only to simplify the tasks of the courts and attorneys, provided such law is properly drawn, eliminating in advance potential areas of controversy. In addition, and probably most important, the Bill would utilize the full potential of the Judicial Panel and could become a model for future legislation of a similar character, especially in the anti-trust field.

The Bill's deficiencies, while major, would not be difficult to change. Such changes as proposed herein should not seriously impede the interests of any groups currently favoring or opposing the legislation, but should increase the probabilities of eventual passage by Congress. While the author's manner of dealing with the problems raised by the Bill are not the only solutions, they do seem as pointed out above to be more reasonable than the present provisions.

KENNETH W. JOHNSON

59. W. PROSSER, *LAW OF TORTS* § 105 (2d ed. 1955).

60. *Id.*, citing the following cases: *Gardner v. Hobbs*, 69 Idaho 288, 206 P.2d 539 (1949); *Van Cleve v. Lynch*, 109 Utah 149, 166 P.2d 244 (1946); *Herro v. Steidl*, 255 Wis. 65, 37 N.W.2d 874 (1949); *Gulf Transport Co. v. Allen*, 209 Miss. 206, 46 So. 2d 436 (1950); *Seaboard Air Line R.R. v. Martin*, 56 So. 2d 509 (Fla. 1952); *Coliseum Motor Co. v. Hester*, 43 Wyo. 298, 3 P.2d 105 (1931).

APPENDIX

SENATE BILL NO. 961
91ST CONGRESS

To improve the judicial machinery by providing for Federal jurisdiction and a body of uniform Federal law for cases arising out of aviation and space activities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 85 of title 28, United States Code, is amended—

(1) by adding a new sentence at the end of section 1333 as follows: "The admiralty, maritime, and prize jurisdiction herein does not extend to any case arising under chapter 174 of this title, and may extend in relation to the subject matter of chapter 174 of this title only to the extent provided in section 1363 (b) of this chapter.";

(2) by striking out the period at the end of section 1346 (b) and by inserting in lieu thereof a comma and the following: "except that cases arising out of, or in the course of, aviation activity or space activity as defined in chapter 174 of this title, shall be governed thereby.";

(3) by adding a new section following section 1362 as follows:

"§ 1363. Aviation and space activities

"(a) The district courts, including those of the Canal Zone, Guam, Puerto Rico, and the Virgin Islands, shall have original jurisdiction, exclusive of the courts of the States and of all other courts, of any action for damages for injury or loss of property, or personal injury or death arising out of, or in the course of, an accident, which arises out of, or in the course of— (1) the flight, takeoff, or landing of an aircraft— (A) engaged in the carriage by aircraft of persons or property as a common carrier for compensation or hire, or (B) having a seating capacity of more than ten persons; (2) the flight, takeoff, or landing of an aircraft and which proximately results in the death of or personal injury to five or more persons; or (3) space activity.

"(b) All the district courts mentioned in subsection (a) of this section and the courts of the States, territories, possessions, and Commonwealth of Puerto Rico shall have original jurisdiction, concurrently with any admiralty or maritime jurisdiction which may otherwise exist, of any civil action not covered by subsection (a) of this section which arises out of, or in the course of, ground activity which is incidental to any of the aircraft operations or space activity described in subsection (a) of this section.

"(c) Except as provided in subsections (a) and (b) of this section, all of the district courts mentioned in subsection (a) of this section concurrently with the courts of the States, territories, possessions, and the Commonwealth of Puerto Rico shall have original jurisdiction of any civil action which— (1) arises out of or in the course of an accident which arises out of or in the course of the flight, takeoff, or landing of a— (A) large aircraft, (B) high-performance aircraft, or (C) public aircraft; or (2) arises out of a transaction or occurrence which gives rise to an action of which the district courts otherwise have jurisdiction under section 1346 (b) of this chapter, and to which chapter 174 of this title is applicable.

"(d) Except as provided in subsections (a), (b), and (c) of this section, original jurisdiction of any civil action arising under chapter 174 of this title shall be vested in—

"(1) the courts of the States, territories, possessions, and the Commonwealth of Puerto Rico, and

"(2) the district courts, only to the extent such district court jurisdiction exists under other provisions of law: *Provided*, That for the purpose of this clause and such other provisions of law, chapter 174 shall be deemed not to be a law of the United States.

"(e) DEFINITIONS.—" 'accident' means any occurrence which proximately results in the death of or injury to persons or injury to or loss of property and includes any occurrence which, if it occurred with respect to a civil aircraft in flight, would be an accident within the meaning of title VII of the Federal Aviation Act of 1958 (49 U.S.C. 1441 et seq.) [remainder omitted]

"(f) Jurisdiction of actions against the United States is not created under this section, but exists to the extent provided in other provisions of law. . . ."

SEC. 2. Chapter 87 of title 28, United States Code, is amended—

(1) by striking out the period at the end of section 1402(b) and inserting in lieu thereof a comma and the following: "except as provided in section 1408 of title.";

(2) by adding after section 1407 a new section as follows:

"§ 1408. Actions involving aviation and space activities; service of process

"(a) Any action under subsection (a) of section 1363 of this title may be brought in the judicial district in which the plaintiff resides, or has his or its principal place of business, or in which the defendant resides, is incorporated, is licensed to do business, is doing business, or may be found. Any action against the United States under section 1346(b) of this title governed by chapter 174 of this title and which arises out of or in the course of such aircraft operations or space activity as are described in section 1363(a) of this title may be brought in any judicial district.

"(b) Process in the actions referred to in subsection (a) of this section (including third-party and other ancillary proceedings) may be served throughout the jurisdiction of the United States. Upon application and cause shown, in accordance with the Federal Rules of Civil Procedure, a subpoena for attendance at a hearing or trial in any action referred to in subsection (a) of this section or in any action in a district court referred to in section 1363(c) of this title may be served at any place.

"(c) If actions referred to in subsection (a) of this section, arising out of the same occurrence, are brought in more than one district, the judicial panel on multidistrict litigation authorized by section 1407 of this title may—(1) transfer such action to any district for any or all purposes, as well as for pretrial proceedings, and (2) at any time or stage in the proceedings, retransfer any, or any number of such actions, or any separate claim, cross-claim, counterclaim, third-party claim, or issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues therein to the district from which originally transferred or to any other district.

Transfers and retransfers under this subsection shall be determined by the same factors as transfers under section 1407(a) of this title. The provisions respecting the designation of, assignment of, and assignment of functions of the judicial panel on multidistrict litigation, the provisions for procedure and review, and all other provisions of the remainder of section 1407 of this title shall apply for all purposes, as well as for pretrial proceedings to actions subject to this subsection, to transfers and retransfers under this subsection, and to actions or parts of actions so transferred or retransferred.

"(d) This section does not affect any laws or rules of law or treaty provisions governing the propriety or convenience of venue within the United States as a whole. . . ."

SEC. 3. Chapter 161 of title 28, United States Code, is amended—

(1) by striking the period at the end of section 2401(b) and inserting in lieu thereof a comma and the following: "except as provided in subsections (c) and (d);

(2) by inserting at the end of section 2401 new clauses, as follows:

"(c) A tort claim against the United States governed by chapter 174 of this title shall be forever barred unless action is begun not later than one year after such claim accrues, except as provided in subsection (d) below.

"(d) A tort claim against the United States governed by chapter 174 of this title, for contribution, indemnity or other remedy over, or that the United States is or may be liable to the party asserting the claim for all or part of a claim originally asserted against him in an action for damages under section 2752 of this title shall be forever barred unless action to enforce such claim is begun not later than whichever is the latest of—(1) one year after the original right of action accrued; (2) ninety days after service of process upon the party who is to assert such claim; or (3) the time permitted under the Federal Rules of Civil Procedure, if asserted by counterclaim, cross-claim, or third-party complaint in the original action. . . ."

(3) by inserting in the text of section 2415(b) after the word "Congress," the following: "and except as provided in subsection (c)."; and

(4) by renumbering in section 2415 the respective subsections (c), (d), (e), (f), (g), and (h) as (d), (e), (f), (g), (h), (i), and inserting a new subsection as follows:

"(c) Subject to the provisions of section 2416 of this title, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort and which is governed by chapter 174 of this title shall be barred unless the action is begun not later than one year after the right of action first accrues: *Provided, however,* That in the case of a claim by the United States for contribution, indemnity or other remedy over, or that another person or party is or may be liable to the United States for all or part of a tort claim originally asserted against the United States in an action for damages under section 2752 of this title, time limitations for and conditions upon which the United States may assert such claim shall be the same as in the case of a party asserting a like claim against the United States as provided in section 2401 (d) of this title. . . ."

SEC. 5. Part VI of title 28, United States Code, is amended—

(1) by adding a new chapter 174 following chapter 173 as follows:

"Chapter 174.—AVIATION AND SPACE ACTIVITIES

"§ 2741. Definitions [omitted]

"SUBCHAPTER II—SUBSTANTIVE LAW

"§ 2751. Substantive law, generally

"(a) Subject to the exceptions, limitations, and exclusions of this subchapter, there hereby exists a uniform body of Federal law governing all civil legal relations and all acts, transactions, matters, and things (including injury or loss of property or personal injury or death, regardless where consummated), arising out of, or in the course of, aviation activity or space activity. The civil legal relations governed thereby include all personal rights and liabilities (including those of all corporations, companies, associations, firms, partnerships, societies, joint stock companies, governments, and governmental entities as well as individuals) and all property rights and liabilities. Said body of law is exclusive of any other law (including the law of the several States, and of the territories and possessions, the Commonwealth of Puerto Rico, the District of Columbia, and the admiralty or maritime law) except to the extent that the adoption therein of local law rules, including but not limited to rules of domestic relations and inheritance law, would not thwart the purpose of this section. The rules of said body of law shall be ascertained by decisions of courts of competent jurisdiction in cases or controversies, subject to any other applicable Federal law or regulation having the force of law, or treaty, or other agreement having the force of a treaty.

"(b) This section does not affect—(1) the power (of whatever extent, if any, as otherwise may exist) of the several States, territories, possessions, the Commonwealth of Puerto Rico, and the District of Columbia of—(A) criminal jurisdiction and application of the criminal laws; (B) civil and administrative penalties and forfeitures imposable for the enforcement or vindication of public rights, powers, or duties; (C) service of process; and (D) taxation; (2) the power of the several States of economic regulation of commerce by air which is wholly intrastate, to the extent that the same is not subject to, or is granted exemption from, economic regulation by an agency of the United States. 'Economic regulation' as used in this clause means regulation of matters and things which, if in interstate or foreign commerce, would be within the jurisdiction of the Civil Aeronautics Board (or a successor agency) under title IV of the Federal Aviation Act of 1958, or a successor statute.

"§ 2752. Accident actions; death actions; survival of personal injury actions

"(a) There is hereby specifically included in the body of law created in section 2751 of this subchapter the right of action for damages for injury or loss of property, or personal injury or death arising out of, or in the course of, an accident, as defined in section 1363 of this title, which arises out of, or in the course of, aviation activity, or space activity subject to the exceptions, limitations, and exclusions of this chapter.

Unless otherwise or hereafter provided by other Federal law or regulation having the force of law or treaty or other agreements having the force of law or treaty—(1) the contributory negligence doctrine of the law of the majority of the States of the United States is applicable to any such action; (2) a right of contribution, arising and enforceable at the same time as the above-mentioned right of action for damages, exists among all parties who, if sued separately, are or would be liable on such right of action for damages. Liability for and amount of contribution shall be apportioned in accordance with the gravity of breach of duty found. Such right of contribution is enforceable as soon as it arises, in the same or another action under otherwise proper jurisdiction and procedure, against all such parties against whom it arises regardless whether such parties were initially sued. The existence of this right of contribution does not exclude the existence of the right of indemnity in otherwise proper cases.”

“(b) For the exclusive benefit of the decedent’s surviving or (1) the right of action for death exists under subsection (a) of this section, and (2) the right of action for personal injury to the decedent under subsection (a) of this section survives.

“(c) If the domicile at death of the decedent and the wrongful death or other relevant law of such domicile can be ascertained without undue inconvenience and if the adoption of the rules of such law would not thwart the purposes of this section, the rules of such law shall determine the respective interests of the beneficiaries in such right of action.

“(d) The recovery under subsection (b) (1) of this section shall be a fair and just compensation for the pecuniary loss sustained by those for whose benefit the right of action exists. The recovery under subsection (b) (2) of this section shall not include any damages for pain, suffering, or disfigurement. There shall be no limitation on the amount of recovery except as otherwise or hereafter provided by treaty or other international agreement having the force of treaty or other Federal law or regulation having the force of law.

“§ 2753. Time limitations

“(a) The right of action for damages under section 2752 of this subchapter is forever barred unless the action is begun not later than one year after the right of action accrues.

“(b) Every claim for contribution, indemnity or other remedy over, and every other claim that a person or party is or may be liable to the party asserting the claim for all or part of the claim originally asserted against him in an action for damages under section 2752 of this subchapter, shall be forever barred unless action to enforce such claim is begun not later than whichever is the latest of—(1) one year after the original right of action accrues; (2) ninety days after service of process upon the party who has been served such claims; or (3) such time as may be permitted by the court for the reasonably diligent assertion of such claim, if asserted by otherwise proper procedure in or ancillary to the original action.

“§ 2754. Exception of compensation remedies

“The provisions in this subchapter do not include any right of action for damages for personal injury or death where any such right of action would be inconsistent with the provisions or intent of any workmen’s or employees’ compensation statute or system, or similar system of compensation or benefits, and do not affect the operation of any workmen’s or employees’ compensation statute or system or similar system of compensation or benefits.

“§ 2755. Outer space activity

“The uniform body of Federal law provided for in this subchapter extends to space activity which is outside of the national sovereignty of the United States, but the specific rules of substantive law therein to be applied to such space activity which is outside of the national sovereignty of the United States shall be such as may be otherwise or hereafter created or recognized by treaty or international agreement having the force of treaty.

"SUBCHAPTER III—DISTRICT COURT PROCEDURE**"§ 2761. Jury trial**

"In actions in Federal district courts under this chapter, there is a right of trial by jury of any issue of fact therein regardless where the action arises if in an otherwise like case, but which arose at law, such right would exist under the United States Constitution. In actions against the United States in Federal district courts under this chapter the right, if any, of trial by jury may exist, if, when and to such extent as may be otherwise or hereafter provided in other provisions of law.

"§ 2762. Death actions, survival of personal injury actions

"(a) If an action arising out of aviation or space activity provided for in section 2752 (b) of this chapter is brought in a Federal district court, otherwise having jurisdiction, the same may be brought in behalf of all of the beneficiaries by one or more of them or by the personal representative of the decedent. All such claims of all of the beneficiaries of the decedent shall be brought in one action.

"(b) For the purposes of this action, the district court may in its discretion appoint a personal representative of the decedent if one has not been otherwise properly appointed. Such personal representative shall have the responsibilities and duties of a fiduciary in the State in which the personal representative is initially qualified to act. A personal representative qualified to act hereunder in one district is qualified to act in any other district to which or in which the action, or any, part thereof, may be transferred or is pending.

"(c) Unless otherwise determined in accordance with rules of law adopted as provided in section 2752 (c) of this title, shall apportion the recovery, if any, among those entitled to the benefit thereof in proportion to the loss they severally suffered by reason of the death of the decedent and the damages shall not form a part of the estate of the deceased.

"(d) Where a right of action mentioned in subsection (a) of this section exists for the death of a person, and there is already an action pending in a district court in behalf of the decedent for personal injury claimed to result from the same occurrence, a separate action for such death shall not be brought, but the court shall permit whoever may bring an original action for the death of the decedent to be substituted as a party in the pending action, upon application properly and timely made in accordance with the Federal Rules of Civil Procedure, and the action shall thereafter proceed as if originally brought as an action for the death of the decedent.

"§ 2763. Separate trials and judgments

"In any action referred to in section 1408 (a) of this title—

"(a) Separate trial may be had of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue, or of any number of claims, counterclaims, cross-claims, third-party claims, or issues, if such separate trial is otherwise proper.

"(b) Upon the separate trial of any issue or issues within a claim, cross-claim, counterclaim, or third-party claim, or when there are multiple parties thereto, the court may direct the entry of a final judgment as to one or more but fewer than all of the issues or parties upon an express determination that it is in the interest of efficient administration of justice to do so and upon an express direction for such entry of judgment. . . ."